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81-5400

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

_____TERM, 19____

LACEY G. STANLEY, JR., APPELLANT)
VS.)
SARAH W. STANLEY, APPELLEE)

APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA

JURISDICTIONAL STATEMENT

Rodney Shelton Toth
Counsel for Appellant

OF COUNSEL:
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IN THE SUPREME COURT OF THE UNITED STATES

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LACEY G. STANLEY, JR.,)
)
Appellant)
)
vs.)
)
SARAH W. STANLEY,)
)
Appellee)

Pursuant to Rules 12 and 15 of the Rules of the Supreme Court of the United States, Appellant, Lacey G. Stanley, Jr., files this Statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the Order entered by the Supreme Court of North Carolina in this case and should exercise such jurisdiction herein. (1)

I. QUESTIONS PRESENTED

A. WHETHER OR NOT EQUAL PROTECTION OF THE LAW WAS VIOLATED BY NORTH CAROLINA GENERAL STATUTE §50-13.4 REQUIRING THE FATHER TO BE PRIMARILY LIABLE FOR SUPPORT OF THE CHILD AND ALLOWING THE MOTHER REIMBURSEMENT FOR BACK CHILD SUPPORT?

B. WHETHER OR NOT EQUAL PROTECTION OF THE LAW AND DUE PROCESS OF LAW WERE VIOLATED BY NORTH CAROLINA GENERAL STATUTE §50-13.4 WHICH ALLOWED THE TRIAL COURT TO BASE AN AWARD OF PROSPECTIVE AND BACK CHILD SUPPORT UPON EARNING CAPACITY RATHER THAN ABILITY TO PAY WHEN THE ONLY EVIDENCE OF WILLFUL DISREGARD OF PARENTAL DUTY OF SUPPORT WAS THE DEFENDANT HAD SEVERAL JOBS, HAD MOVED QUITE OFTEN AND WENT FOR LONG PERIODS WITHOUT CONTACTING HIS CHILD OR EX-WIFE?

C. WHETHER OR NOT SUBSTANTIVE DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW WERE VIOLATED BY THE TRIAL COURT PURSUANT TO NORTH CAROLINA GENERAL STATUTE §50-13.4 ORDERING THE DEFENDANT TO PAY CHILD SUPPORT, PART OF WHICH WOULD BE USED TO SEND THE MINOR CHILD TO A PRIVATE SCHOOL WITHOUT THE NONCUSTODIAL PARENT'S CONSENT OR SPECIFIC COURT APPROVAL?

(1) Pursuant to Rule 28.4(c) of the Rules of the Supreme Court, a copy of this jurisdictional statement is being served upon the Attorney General of the State of North Carolina in that the constitutionality of NCGS-Sec.50-13.4 is drawn in question and 28 USC Sec.2403(b) may be applicable.

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IV. OPINIONS BELOW

The opinion of the North Carolina Court of Appeals filed on March 17, 1981 and the Order of the Supreme Court of North Carolina dismissing the Appeal of Appellant, and denying Petition for Discretionary Review entered June 8, 1981 are included herein in the Appendix.

V. GROUNDS FOR JURISDICTION OF SUPREME COURT

This Appeal arises from an action for child support. The Order of the Supreme Court of North Carolina was entered on June 8, 1981 dismissing Appellant's Notice of Appeal and denying Petition for Discretionary Review from the Opinion of the Court of Appeals of North Carolina affirming an award of back and prospective child support.

A timely Notice of Appeal was filed in the Office of the Clerk of the Court of Appeals of North Carolina on July 8, 1981, the Court having possession of the record after the Clerk of the Supreme Court of North Carolina by letter dated July 7, 1981 informed the Appellant that it was the opinion of the Supreme Court of North Carolina that the Notice of Appeal should be filed in the North Carolina Court of Appeals, a copy of which letter is included herein as Appendix C.

The jurisdiction of this Court is invoked under the provision of Title 28, United States Code, §1257(2).

VI. CONSTITUTIONAL PROVISIONS AND STATUTES

Fifth Amendment, U. S. Constitution (Appendix D)

Fourteenth Amendment, U.S. Constitution (Appendix E)

North Carolina General Statute §50-13.4, Action for Support of Minor Child

> ....(b) In the absence of pleading and proof that circumstances of the case otherwise warrant, the father, the mother, or other person, agency, organization or institution standing in loco parentis shall be liable, in that order, for the support of a minor child. Such other circumstances may include, but shall not be limited to, the relative ability of all the above mentioned parties to provide support or the inability of one or more of them to provide support, and the needs and estate of the child. Upon proof of such circumstances the Judge may enter an Order requiring any one or more of the above mentioned parties to provide for the support of the child, as may be appropriate in the particular case, and if appropriate, the Court may authorize the application of any separate estate of the child to the support. (See Appendix F)

VII. STATEMENT OF THE CASE

The Plaintiff-Appellee, Sarah W. Stanley, brought this action against the Defendant-Appellant, Lacey G. Stanley, Jr., for child support and maintenance for their child, Joy Stanley, before the January 1979 Term of the District Court of Mecklenburg County, North Carolina. After a hearing, The Honorable William G. Jones,

Judge presiding, entered a Judgment in favor of the Plaintiff requiring the Defendant-Appellant to pay to the Plaintiff the amount of $14,400.00 in back child support, to begin paying support in the amount of $200.00 per month, and to grant the Plaintiff-Appellee a security interest in the 1977 Oldsmobile of the Defendant. From this Order the Defendant appealed to the North Carolina Court of Appeals, the Supreme Court of North Carolina, and now to the Supreme Court of the United States.

The Appellee and Appellant were married on November 30, 1963, never got along, lived for a while at the home of the Plaintiff-Appellee's parents and separated shortly afterwards. They were the parents of one child, Joy Elizabeth Stanley. After the separation, the parties appeared at a Court hearing in which the Plaintiff-Appellee did not appear, and the Judge ordered the Appellant to continue to pay $10.00 per week child support.

The Appellant is presently unemployed in his occupation as an airplane pilot, and has been from July 1978 until the present. (Rp 32)[2] Prior to this time, the Appellant was employed only from September, 1977 until April, 1978 in the amount of $850.00 per month, and from April 1978 until July 1978 at a gross salary of $1,500.00 per month. This last job was terminated when the company for which he worked ran into financial difficulties. (Rp 32) Since that time the Appellant has obtained his Boeing 727 flight certificate and attempted to obtain other employment, but has failed to do so because of his age, 36, which is past the cutoff point for most airlines hiring new pilots. (Rp 63) The male Appellant has applied at virtually all major airlines and many smaller airlines without success, (Rpp 63, 72-77; Exhibits B, C, D, E.) and at the date of the hearing was receiving no income (Rp 15). His monthly expenses total $988.40 per month, and Appellant has been forced to borrow $10,000.00 to meet expenses (Rpp 10-11).

The Plaintiff-Appellee stated her average expenditure for the child during the past three years was approximately $465.00 per month. Furthermore, the child had incurred substantial medical expenses in 1979 in the amount of $4,474.93; however, all but between $420.00 and $456.00 were reimbursed by insurance. The Plaintiff has a gross monthly salary of approximately $950.00 and drives a late model Cadillac. (Finding of Fact #32) Included in the "necessary" expenses of the child were $60.00 per month for clothes, $80.00 per month for dry cleaning and makeup, and $80.00 for tuition at a private school.

(2) (Rp - denotes record on appeal and page number)

The trial court applied North Carolina General Statute §50-13.4 and found the Defendant's fair share of support for the three years immediately preceding the action was $400.00 per month, totalling $14,400.00, and awarded $200.00 per month in prospective child support. The Appellant contended this was far in excess of his ability to pay, when all the evidence indicated the amount of money earned by him for three years prior to this action was approximately $11,200.00. (Rp 24; 4 months, 1977 at $850.00 per month; Rp 13; $7,800.00-1978 income tax) By contrast, the Plaintiff-Appellee earned approximately $34,200.00 ($950.00 per month x 36) for the same period. Yet, the Court required the Appellant to pay $400.00 of the $465.00 per month the Plaintiff claimed as necessary expense for support, despite the fact that the Defendant-Appellant had monthly expenses nearly twice that amount and the Appellee earned nearly three times as much as the Appellant.

The North Carolina Court of Appeals and the Supreme Court of North Carolina upheld the decision of the trial court by holding the father had the primary responsibility to provide support for the child.

The above constitutional issues were preserved in Appellant's Assignments of Error, Arguments A and B of his Brief, by Defendant's Motion to Dismiss pursuant to Rule 12(b)(6), his Exceptions and Notice of Appeal to the Order of The Honorable William G. Jones entered on the 29th day of January, 1980, and his Notice of Appeal and Petition for Discretionary Review filed with the Supreme Court of North Carolina.

VIII. FEDERAL QUESTIONS ARE SUBSTANTIAL

1. Equal Protection of the Law

The Fourteenth Amendment of the United States Constitution states that no State shall deprive any person of life, liberty or property without due process of law or deny to any person within its jurisdiction the equal protection of the law. Thus, classification based on sex, like classifications based on race, alienage and national origin are inherently suspect and must be therefore subjected to close judicial scrutiny in order to "withstand scrutiny" under the equal protection clause. Classification by gender must serve important governmental objectives and must be substantially related to achievement of those objectives. Orr vs. Orr 440 U.S. 268, 279 (1979); Califano vs. Webster, 420, U.S. 313 (1977).

North Carolina General Statute §50-13.4(b) provides:

> In the absence of pleading and a proof that circumstances of the case otherwise warrant, the father, the mother or any person, agency, organization or institution standing in loco parentis shall be liable, in that order, for the support of the minor child ...

Quite clearly, NCGS §50-13.4 provides a different treatment on the basis of sex by requiring the father to be primarily liable for support. The fact that the classification expressly discriminates against men rather than women does not protect it from scrutiny. Craig vs. Boren, 429 U.S. 190 (1976). Under this statute as interpreted by the North Carolina Courts in Tidwell vs. Booker, 290 NC 98, 225 SE 2d 816 (1976), the mother is entitled to reimbursement for funds she expends in support of the child under the theory that the parties secondarily liable for the payment of an obligation, who is compelled by the default of the party primarily liable therefore to pay it, may by action brought within the period of the applicable statute of limitations, compel the party primarily liable to reimburse her for such expenditure. 290 NC at 116, 225 SE 2d at 834 (1976).

In the case at bar the trial court awarded a Judgment of back child support against the Appellant despite the fact that his wife earned nearly three times as much as he for the three years immediately preceding the action, ($34,200.00 vs. $11,200.00; see Statement of the Case), and the Appellant's average income was only $311.00 for the 36 months preceding the institution of the action ($11,200.00 ÷ 36 = $311.00; see Statement of the Case). Furthermore, the Appellant is required to pay prospective child support in the amount of $200.00 per month even though he is at the present time unemployed. Thus, this Statute is inherently suspect by creating a presumption in favor of support by the father. The same award of back child support and prospective child support could not be made against the mother under this law.

The next question is whether this inherently suspect classification serves important governmental objectives and is substantially related to achievement of those objectives. In 1979 this Court declared unconstitutional a similar Alabama Statute authorizing the imposition of alimony obligations upon husbands, but not on wives. Orr vs. Orr, supra. In Orr, the Supreme Court expressly dismissed as important governmental objectives the State's view that the alimony statute effectively announced the State's preference for an allocation of family responsibilities under which the wife plays a dependent role, as seeking for their objective the reinforcement of that model among the State's citizens by holding that:

> The old notion that generally it is the man's primary responsibility to provide a home, and its essentials, can no longer justify a statute that discriminates on the basis of gender. No longer is the female destined solely for the home and the rearing of the family, and only for the male for the market place and the world of ideas. 440 US at 279.

Furthermore, the Court held the purpose of providing support for the wife of a broken marriage who needed financial assistance, while a legitimate and important objective,

could not constitutionally be substantially related to the achievement of those objectives. In similar cases, this Court has declared unconstitutional statutes based upon gender in Frontiero v Richardson, 411 US 677 (1972), statute unconstitutional which allowed male members of the Navy to claim spouses as dependent, but which did not allow females the same claim; Caban v Mohammed, 441 US 380 (1979), striking down statute allowing for an unwed mother to prevent adoption of an illegitimate child, but not the unwed father; Califano v Goldfarb, 430 US 199 (1977), striking down a sex distinction of the Federal Old Age, Survivors and Disability Insurance Benefits Program; Weinberger v Wiesenfield, 420 US 636 (1974), declaring unconstitutional a sex distinction for the obtaining of social security benefits; and Califano v Westcott, 443 US 76 (1979), declaring that the AFDC-UF Program, which provided benefits to families with dependent children whose families have been deprived of support because of the father, but did not provide such benefits when the mother was unemployed violated due process of law.

In short, the application of NCGS Sec. 50-13.4 requiring the father to be primarily liable for support of the minor child violates equal protection of the law.

2. Due process of law

The Appellant contends the award of back and prospective child support when he was unemployed and had no ability to pay the award was arbitrary and capricious. Substantive due process requires that no person shall be deprived of his life, liberty or property for arbitrary reasons, such a deprivation being constitutionally supportable only if the conduct from which the deprivation flows is proscribed by reasonable legislation. State v Joyner, 286 NC 366, 211 SE 2d 320 (1978). Thus, courts have declared unconstitutional laws which are overly vague in Hynes v Oradell, 425 US 610 (1975), Municipal ordinance requiring door to door solicitors to give written notice to police unconstitutional; Colautti v Franklin, 439 US 379 (1979), striking down State statute concerning abortion; Soglin v Kauffman, 418 F 2d 163 (1969), University disciplinary proceeding resulting in suspension for misconduct vague when word (misconduct) not defined; Corley v Lewless, 227 Ga 745, 182 SE 2d 766 (1971), statute making parents liable for tortious acts of children unconstitutional where only requirements are that parents have "custody and control" over children and that acts be willful and wanton in nature; and Hooper v Laird, 157 App DC 195, 482 F 2d 784 (1973), declaring the Uniform Code of Military Justice vague for proscribing conduct of a nature to bring discredit upon the Armed Forces.

N.C.G.S. Sec. 50-13.4(c), which allows the Court in awarding child support to look at "the estates, earnings, conditions, accustomed standard of living of the child and the parties and other facts of the particular case (Emphasis Added)." by determining the Defendant had the earning capacity to provide child support in excess of his ability to pay, is both arbitrary in nature and arbitrarily applied, violating substantive due process. Even though the Appellant did not have the ability to pay the back child support nor prospective support, the North Carolina Court of Appeals held a judgment could be obtained for back child support and an order entered requiring payment of prospective support based upon the father's earning capacity. The earning capacity fell under the "other facts of the particular case". In the case at bar, the specific facts used by the Court were that the defendant had paid nothing for the child's support since 1966, had constantly changed places of employment, and had failed to inform the plaintiff of his address. (Opinion Court of Appeals, p 6) Appellant strongly urges the Court that these are arbitrary considerations depriving him of his property and soon enough his liberty for contempt of court. Certainly, the Privileges and Immunities Clause of the Constitution allows its citizens freedom of movement. In the defendant's occupation of a commercial pilot, one would expect him to travel, and after being laid off at a particular job, would be remiss in not moving to acquire new employment. Moreover, the defendant was under no obligation to inform the plaintiff of his whereabouts. In fact, he denied secreting himself from his former wife. These arbitrary considerations allowed by N.C.G.S. Sec. 50-13.4 violate substantive due process.

Appellant further contends his constitutional rights were violated by the trial court awarding his wife child support payments, part of which were to be spent on the private education of the minor child without either the defendant's consent or the court's approval. Due process allows parents to direct the upbringing and education of their children. Pierce v Society of Sisters, 268 US 510 (1924). In the case at bar, no procedure was provided for the father to object to his daughter attending private school for which he is now obligated to pay at the rate of $80.00 per month. In several cases, it has been held that the non custodial parent may designate the school of the minor child to whom he is providing support payments. Frizzell v Frizzel, 158 Cal App 2d 652, 323 P 2d 188 (1958); Glass v Glass, 37 SW 2d 467 (1931). In other instances, courts have held the father must be consulted. VanNortwick v VanNortwick, 87 Ill App 2d 55, 230 NE 2d 391 (1967).

The failure N.C.G.S. Sec. 50-13.4 to provide a procedure for hearing on this issue violates due process.

3. Substantial Impact.

The substantial nature of the Federal questions presented for review is readily apparent. Millions of people in the State of North Carolina are affected everyday by court orders regarding child support. Other states with similar statutes likewise affect their residents. In the event fathers are unable to pay child support based upon an alleged earning capacity rather than the ability to pay, they will be subjected to possible contempt of court and loss of freedom. This danger is particularly harmful with the present high degree of unemployment.

IX. CONCLUSION

The court should take jurisdiction of this appeal.

RESPECTFULLY SUBMITTED

Rodney Shelton Toth
Attorney for Appellant

NO. 8026DC627

NORTH CAROLINA COURT OF APPEALS

Filed: 17 March 1981

SARAH W. STANLEY

v. Mecklenburg County
79CVD10144

LACEY GARDNER STANLEY, JR.

FILED
IN THE OFFICE OF
CLERK COURT OF APPEALS
OF NORTH CAROLINA
'81 MAR 17 AM 8 23

Appeal by defendant from Jones, Judge. Order entered 29 January 1980 in District Court, Mecklenburg County. Heard in the Court of Appeals 15 January 1981.

Plaintiff instituted this action on 8 October 1979 for reimbursement of amounts she had expended in the three years immediately preceding the suit for support of the parties' fifteen-year-old daughter and for future payments of child support from defendant, her former husband. Plaintiff's evidence at trial tended to show that the parties were married on 30 November 1963 and were divorced 20 September 1965. The parties' child was born 23 September 1964, some months after the parties had separated.

Plaintiff was awarded custody of the child on the date of the divorce and had supported the child alone since her birth. Defendant had provided $70.00 for plaintiff's and the child's support after the parties had separated and prior to the child's birth and had refused to contribute any amount for maintenance of the child after her birth. Defendant's father had given plaintiff $200.00 to help pay expenses incurred at the child's birth. Plaintiff's numerous attempts to serve defendant with legal process over the years to obtain child support were unsuccessful because defendant had moved so often. She had allowed defendant to see the child whenever he had requested, though she would not allow the child to leave with him since she did not know where defendant lived.

After salary deductions, plaintiff earns $162.26 weekly as an office manager and has monthly expenditures for maintenance of the child of between $455.00 and $512.00. Plaintiff had expended approximately $465.00 monthly for the child's maintenance over the three-year period immediately prior to the suit. The child had been hospitalized for several long periods of time in 1979 and plaintiff had incurred medical expenses that year of between $420.00

and $456.00 which have not been reimbursed by insurance.

Defendant's evidence tended to show that he had paid $10.00 per week to plaintiff under a court order for the first two years of their child's life. He had made no child support payments since that time, although he had earned $800.00 monthly and $1,500.00 monthly at his last two jobs. Defendant is presently unemployed and has no income. His monthly living expenses are $988.40. He has been trying unsuccessfully to obtain employment as an airline or corporate pilot for the past year and a half. Defendant has never had any serious illness requiring hospitalization and has never been required to stay out of work for any length of time for health reasons.

Defendant had moved quite often and had been unaware of plaintiff's efforts to serve him with process over the past fifteen years. He had seen the child only six times since her birth. When he had told plaintiff in 1970 that he was not interested in their living together again, plaintiff had told him that she did not want anything from him and would never allow him to see the child. He had again requested visitation rights in 1977 and had offered to pay child support, but was told by plaintiff that she did not want the money and would not allow him to see the child.

After the trial, the judge made findings of fact which, except as quoted, are summarized as follows. Although defendant had provided modest sums for the child's support during the first two years of her life, he had provided nothing for her support since 1966 and, of necessity, plaintiff had been the sole provider of support and maintenance for the child since that time.

> 14. Defendant, for the three-year period preceding the initiation of this action, was an able-bodied man, and suffered no illness or infirmity which would have impaired or impeded his earning capacity or his ability to provide a reasonable sum for the support of the child.
>
> 15. Defendant, for the three-year period preceding the initiation of this action, was capable of earning substantial sums of money, and had the ability to provide ample support for the child.

The child had required extensive medical care on several occasions.

> 17. Thus, Plaintiff has incurred extraordinary medical expenses for the child, which expenses in 1979 totalled $4,474.93. A major portion of these medical

expenses have been or should be covered by insurance; however, Plaintiff has incurred and will incur a great amount of uninsured medical and hospitalization expenses as a result of the illnesses of the child.

18. Plaintiff has expended for the support and for the needs of the child for the three-year period preceding the initiation of this action an amount in excess of $400.00 a month. Defendant's fair share of support for that period of time is $400.00 per month.

19. Defendant is presently an able-bodied man, capable of earning substantial amounts of money and Defendant has the ability to provide ample support for the child.

20. Defendant is temporarily unemployed and has been unemployed, except for brief periods, since July of 1978.

21. Defendant's training and expertise is as a commercial pilot. Defendant has been flying for over 20 years and had been a commercial pilot for almost 11 years.

22. Defendant's age may preclude him from being employed by a major airline as a pilot.

23. The last job which Defendant had as a commercial pilot paid him a gross salary of $1,500 per month.

24. Though Defendant might not be able to find employment paying this sum, Defendant does have the expertise, training and experience to find gainful employment.

25. Defendant has not make [sic] sufficient efforts to find employment and pay to Plaintiff a reasonable sum for the support of the child.

26. Defendant's failure to exercise sufficient effort to find employment and to exercise his earning capacity is and has been in disregard of his obligation to provide reasonable support for the child.

The child has individual financial needs in excess of $200.00 per month and defendant should be required to pay plaintiff a reasonable sum as support for the child. The plaintiff is fit and proper to have custody of the child and the defendant is fit and proper to have visitation privileges.

Based on these findings of fact, the trial judge concluded as a matter of law that plaintiff was entitled to reimbursement from defendant for his share of the support of the child during the three-year period immediately preceding the suit in the amount of $14,400.00 ($400.00 per month). The court also concluded that plaintiff was entitled to $200.00 per month as prospective child support for the child and that it was in the child's best interests for the plaintiff to have custody of her and for the defendant to

have reasonable visitation privileges. From a judgment and order to that effect, the defendant appealed.

Farris, Mallard & Underwood by David B. Hamilton, for the plaintiff-appellee.

McConnell, Howard, Pruett & Toth by Rodney Shelton Toth, for the defendant-appellant.

MARTIN (Robert M.), Judge.

First, we note that defendant failed to set out and discuss his first and seventh assignments of error in his appellate brief, therefore, they are deemed abandoned. Rule 28(a), N.C. Rules App. Proc. In addition, defendant's brief is utterly void of argument or authority in support of his third assignment of error, therefore, it is also deemed abandoned. "App. R. 28(a) requires that a question be presented and argued in the brief in order to obtain appellate review." Love v. Pressley, 34 N.C. App. 503, 514, 239 S.E. 2d 574, 581 (1977), rev. denied 294 N.C. 441, 241 S.E. 2d 843 (1978).

Defendant's second assignment of error is that the trial court erred in denying defendant's Rule 12(b)(6) motion to dismiss plaintiff's complaint for failing to state a claim upon which relief could be granted.

A complaint is sufficient to withstand a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief can be granted where no insurmountable bar to recovery on the claim alleged appears on the face of the complaint and the allegations contained therein are sufficient to give the defendant sufficient notice of the nature and basis of the plaintiff's claim to enable him to answer and prepare for trial. Sutton v. Duke, 277 N.C. 94, 176 S.E. 2d 161 (1970); Bank v. McCarley & Co., 34 N.C. App. 689, 239 S.E. 2d 583 (1977). For purposes of the motion, the allegations of the complaint must be treated as true. Presnell v. Pell, 298 N.C. 715, 260 S.E. 2d 611 (1979). Measuring plaintiff's complaint by the foregoing rules, we find that the trial court did not err in denying defendant's Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief could be granted because the complaint clearly contains

allegations of facts which, if true, would entitled plaintiff to the relief sought and does not contain any allegation which would act as an insurmountable bar to her recovery on the claims alleged. Defendant's second assignment of error is therefore overruled.

Defendant's sixth assignment of error reads as follows: "[t]he trial court [erred] and violated the Defendant's constitutional rights to due process of law and equal protection of the law by ordering the Defendant to pay Two Hundred Dollars ($200.00) per month to the support of the child based upon the findings of fact in the evidence." This assignment of error is based on 19 exceptions to the judge's findings of fact, on seven exceptions to the judge's conclusions of law and on an exception to the signing and entry of the order. Defendant presents three arguments in his brief regarding this assignment of error.

First, defendant argues that the award of future child support is erroneous because part of that award will be used to educate his child in a private school, an expenditure to which he has not consented. We note that although defendant excepted to the trial court's finding of fact that the child has individual financial needs well in excess of the sum of $200.00 per month, he failed to set out that exception in his brief, thereby abandoning it. Rule 28(b)(3), N.C. Rules App. Proc. Therefore he has no exception on which to base his argument regarding the use of future child support payments to finance the private education of the child.

Second, defendant argues that because the trial court considered the same evidence for both the past and future child support awards, it violated his rights to due process and equal protection by awarding plaintiff $400.00 per month for the thirty-six months immediately preceding the suit and $200.00 per month in the future. The record does not reflect that this constitutional argument, if, indeed, it is a constitutional question, was presented to or considered by the trial court. As a general rule, this Court will not pass upon a constitutional question not raised and considered in the court from which the appeal is taken. Brice v. Moore, 30 N.C. App. 365, 226 S.E. 2d 882 (1976); Carpenter v. Carpenter, 25 N.C.

App. 235, 212 S.E. 2d 911, cert. denied, 287 N.C. 465, 215 S.E. 2d 623 (1975). Moreover, we fail to see any merit in defendant's argument on this point. The trial court obviously based the two awards in question on different evidence, as will be more fully discussed later.

Third, defendant argues that the court erroneously based its award on defendant's earning capacity rather than on his ability to pay. With regard to an award of prospective child support, as a general rule, the court should consider, among other things, the amount which the defendant is earning when the award is made. Robinson v. Robinson, 10 N.C. App. 463, 179 S.E. 2d 144 (1971). "To base an award on capacity to earn rather than actual earnings, there should be a finding based on evidence that the husband is failing to exercise his capacity to earn because of a disregard of his marital obligation to provide reasonable support for his wife and children. Conrad v. Conrad, 252 N.C. 412, 113 S.E. 2d 912." Robinson v. Robinson, supra, at 468, 179 S.E. 2d at 147.

The trial court in the present case made such a finding of fact, finding number 26, as quoted previously. The evidence in the record clearly supports finding number 26 and findings numbers 19-25, also quoted previously. The record indicates that defendant has displayed a continuous and intentional course of conduct designed to allow him to remain free of, ignore, and avoid his parental responsibilities. After paying nominal sums to plaintiff for the child's support for two years, defendant has paid nothing for the child's support since 1966, despite the fact that defendant was employed during this period of time, earning as much as $1,500.00 per month. Moreover, defendant evidenced his intent to avoid his parental responsibilities by constantly changing places of residence and employment and by repeatedly failing to inform plaintiff of his address. In short, the record is replete with evidence supporting the trial court's finding that defendant was failing to exercise his earning capacity because of a disregard of his parental obligation to provide reasonable support for his child. Thus the trial court was correct in basing its award of prospective child support on defendant's earning capacity rather than on defendant's present ability to pay. As noted above, the defendant has abandoned his

exception to the finding that the child has financial needs in excess of $200.00 per month which we note is also clearly supported by the evidence. All of these findings, in turn, support the trial court's conclusion that plaintiff is entitled to $200.00 per month from defendant for the support, maintenance, health, education and welfare of the child. Therefore we affirm the court's award as to prospective child support.

Defendant's fourth and fifth assignments of error attack the trial court's award of $14,400.00 to plaintiff as reimbursement for expenditures by her during the three-year period preceding the suit in support of the child. Defendant's fourth assignment of error reads as follows: "[t]he trial court erred and deprived the Defendant of his constitutional rights of due process of law and equal protection of the law by awarding the Plaintiff back support for three (3) years prior to the institution of the action based upon the evidence and findings of fact." We have discussed defendant's constitutional argument above and have found it to be without merit.

It is clear that a mother is entitled to bring an action against the nonsupporting father for reimbursement of sums expended in support of a minor child after the parties were divorced. Hicks v. Hicks, 34 N.C. App. 128, 237 S.E. 2d 307 (1977). The father's liability in such a case is predicated upon N.C. Gen. Stat. § 50-13.4 which states in part:

> (a) Any parent, . . . having custody of a minor child, . . . may institute an action for the support of such child as hereinafter provided.
>
> (b) In the absence of pleading and proof that circumstances of the case otherwise warrant, the father, the mother, . . . shall be liable, in that order, for the support of a minor child. . . .

As stated in Tidwell v. Booker, 290 N.C. 98, 115-6, 225 S.E. 2d 816, 826-7 (1976) and in Hicks v. Hicks, supra at 129-30, 237 S.E. at 308-9, this statute

> imposes upon the father the primary duty to support the child, the mother's obligation being secondary.
>
> . . .
>
> A party secondarily liable for the payment of an obligation, who is compelled by the default of the party primarily liable therefor to pay it, may, by action brought within the period of the applicable statute of limitations, compel the party primarily liable to reimburse him for such expenditure. (Citations omitted.)

"The measure of defendant's liability to plaintiff is the amount actually expended by plaintiff which represented the defendant's share of support." Hicks v. Hicks, supra at 130, 237 S.E. 2d at 309. In the present case, the trial court found as fact that the amount plaintiff actually expended was in excess of $400.00 per month. Defendant's fifth assignment of error reads as follows:

> The trial court erred in awarding the Plaintiff a back award for child support based upon the findings of fact and the evidence that the Plaintiff had incurred extraordinary medical costs for the child and would incur a great amount of uninsured medical and hospitalization expenses without any evidence upon which to base the amount to be covered by insurance.

The record shows that plaintiff had not yet been fully reimbursed by insurance for certain medical expenditures in the child's behalf during the three-year period in question and therefore was unable to testify to the exact amount of her uninsured medical expenditures in the child's behalf. However, even excluding the medical expenses in question, the record clearly supports the trial court's finding of fact that plaintiff had expended an amount in excess of $400.00 per month in support of the child during the three-year period. Therefore, defendant's fifth assignment of error is overruled.

Thus, the final question which confronts us on this appeal is whether the trial court erred in determining that the defendant's fair share of support for the three years immediately prior to suit was $400.00 per month.

N.C. Gen. Stat. § 50-13.4(c) states:

> Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, and other facts of the particular case. (Emphasis added.)

This statute requires that in determining the defendant's share of support in an action for reimbursement, the court must consider, among other things, the ability of the defendant to pay during the time for which reimbursement is sought. Hicks v. Hicks, supra. However, just as when determining the defendant's liability for prospective child support, where the defendant failed to exercise his earning capacity in disregard of his parental obligation to provide reasonable support for his child, the court should base an award for reimbursement of past child support on defendant's

earning capacity during the time for which reimbursement is sought.

Defendant again argues that the trial court erred in considering his earning capacity during the three-year period rather than his ability to pay. The record shows that during some of the time for which reimbursement is sought, the defendant was employed and during some of that time, he was unemployed and without any income. Therefore, the court was forced to consider both defendant's ability to pay, i.e., his actual earnings, and his earning capacity in arriving at the amount of defendant's share of support for the three-year period in question. We find that with regard to the time that defendant was unemployed, the evidence and the trial court's findings of fact numbers 14, 15, 20, 21, 23 and 25, which are supported by the evidence, clearly support its finding that the defendant had failed to exercise his earning capacity in disregard of his parental obligation to support his child. With regard to the time that the defendant was employed, although the trial court's findings supporting his conclusion that the defendant had the ability to provide $400.00 per month in support of his child lack the degree of specificity which would be required in an action for prospective child support, they are adequate in this action for reimbursement due to the difficulty of proving what defendant's past income and living expenses were. He made no records of them available in response to plaintiff's discovery requests, except his income tax forms for 1978, and defendant's testimony on this issue was vague and somewhat confusing.

Moreover, N.C. Gen. Stat. § 15-13.4(c) clearly allows the trial court to consider "other facts of the particular case" in arriving at the amount of defendant's share of support in an action for reimbursement. Thus, while the defendant's ability to pay and his earning capacity are factors to be considered, they are not controlling. The court may also consider the conduct of the parties and the equities of the case. In this case, it would be inequitable to allow the defendant to prevail on his argument that the mother should have based her expectations for reimbursement solely on his ability to pay where the record clearly shows that he moved quite often and went for long periods, sometimes years, without contacting the child or his ex-wife, thereby defeating her attempts to force

him to support his child and preventing her from determining what his ability to pay was. In addition, defendant readily admitted that even during the times that he was earning substantial salaries, and therefore could have supported the child, he chose not to do so. A mother, who was forced, of necessity, to be the sole provider of support and maintenance for her child for fifteen years, should not be required to measure her expenditures in the child's behalf by guessing about the extent of the defaulting and absent father's ability to pay or earning capacity.

Thus, after carefully scrutinizing the evidence in the record concerning the action for reimbursement, we find that the evidence supports the trial court's findings of fact, that the findings, in turn, support the trial court's conclusions of law, and the conclusions of law support the order and judgment. Therefore we also affirm the trial court's award of $14,400.00 as reimbursement to plaintiff by defendant for expenditures made by her in support of the parties' minor child during the three-year period immediately prior to the institution of this action.

Affirmed.

Judges HEDRICK and CLARK concur.

A TRUE COPY
CLERK OF THE COURT OF APPEALS
OF NORTH CAROLINA

BY Diane Beal
DEPUTY CLERK

March 20, 1981

SUPREME COURT OF NORTH CAROLINA

Spring Term 1981

SARAH W. STANLEY v. LACEY G. STANLEY, JR.	JUDGMENT DISMISSING APPEAL ON MOTION OF PLAINTIFF AND DENYING PETITION FOR DISCRETIONARY REVIEW (8026DC627)

This matter came on to be considered upon defendant's notice of appeal from the North Carolina Court of Appeals, pursuant to G. S. 7A-30, upon the plaintiff's motion to dismiss the appeal for lack of a substantial constitutional question, and upon defendant's petition for discretionary review of the decision of the North Carolina Court of Appeals, pursuant to G. S. 7A-31; upon consideration whereof, it is adjudged by the Court in conference this 2nd day of June, 1981, that the motion to dismiss the appeal be allowed, that the petition for discretionary review be denied, and that it be so certified to the North Carolina Court of Appeals.

It is considered and adjudged further that the defendant do pay the sum of NINE AND NO/100 DOLLARS ($9.00) and execution issue therefor.

s/ Meyer, J.
For the Court

The foregoing order is issued over my hand and the seal of the Supreme Court this 8 day of June, 19 81.

s/ John R. Morgan
John R. Morgan
Clerk of the Supreme Court
of North Carolina

cc: North Carolina Court of Appeals
McConnell, Howard, Pruett & Toth, Attorneys at Law
Farris, Mallard & Underwood, Attorneys at Law

A TRUE COPY
JOHN R. MORGAN
CLERK OF THE SUPREME COURT
OF NORTH CAROLINA
BY L.A. Pennington
DEPUTY CLERK

APPENDIX B

SUPREME COURT OF NORTH CAROLINA
J. GREGORY WALLACE, CLERK
AREA CODE 919 733-3723 P. O. BOX 2170
RALEIGH, NORTH CAROLINA 27602

MRS. PEGGY N. BYRD
CHIEF DEPUTY CLERK
MISS TERRY E. WATKINS
MRS. SHAULA A. PENNINGTON
DEPUTY CLERKS

July 7, 1981

Rodney S. Toth, Esq.
McConnell, Howard, Pruett & Toth
1400 City National Center
200 South Tryon Street
Charlotte, N. C. 28202

Dear Mr. Toth:

We have received your letter and Notice of Appeal to the United States Supreme Court. The action of this court simply dismissed your appeal for lack of a substantial constitutional question and denied your petition for discretionary review of the Court of Appeals decision in the case.

It is our opinion that, under Rule 10.3 of the Rules of the U. S. Supreme Court, you should properly be appealing the judgment of the North Carolina Court of Appeals. That court is the last to have issued an opinion in your case.

Accordingly, by copy of this letter, I am forwarding the entire packet of your correspondence to the Honorable Francis E. Dail, Clerk of the North Carolina Court of Appeals.

Sincerely,

J. Gregory Wallace
Clerk of the Supreme Court

JGW/sap

xc: Honorable Francis E. Dail, Clerk of Court of Appeals
David B. Hamilton, Esq., Attorney at Law

CONSTITUTION

of the

UNITED STATES OF AMERICA

AMENDMENT 5

Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 50-13.4. Action for support of minor child. — (a) Any parent, or any person, agency, organization or institution having custody of a minor child, or bringing an action or proceeding for the custody of such child, or a minor child by his guardian may institute an action for the support of such child as hereinafter provided.

(b) In the absence of pleading and proof that circumstances of the case otherwise warrant, the father, the mother, or any person, agency, organization or institution standing in loco parentis shall be liable, in that order, for the support of a minor child. Such other circumstances may include, but shall not be limited to, the relative ability of all the above-mentioned parties to provide support or the inability of one or more of them to provide support, and the needs and estate of the child. Upon proof of such circumstances the judge may enter an order requiring any one or more of the above-mentioned parties to provide for the support of the child, as may be appropriate in the particular case, and if appropriate the court may authorize the application of any separate estate of the child to his support.

(c) Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, and other facts of the particular case.

(d) Payments for the support of a minor child shall be ordered to be paid to the person having custody of the child or any other proper person, agency, organization or institution, or to the court, for the benefit of such child.

(e) Payment for the support of a minor child shall be paid by lump sum payment, periodic payments, or by transfer of title or possession of personal property of any interest therein, or a security interest in real property, as the court may order. In every case in which payment for the support of a minor child is ordered and alimony or alimony pendente lite is also ordered, the order shall separately state and identify each allowance.

(f) Remedies for enforcement of support of minor children shall be available as herein provided.

(1) The court may require the person ordered to make payments for the support of a minor child to secure the same by means of a bond, mortgage or deed of trust, or any other means ordinarily used to secure an obligation to pay money or transfer property, or by requiring the execution of an assignment of wages, salary or other income due or to become due.

(2) If the court requires the transfer of real or personal property or an interest therein as provided in subsection (e) as a part of an order for payment of support for a minor child, or for the securing thereof, the court may also enter an order which shall transfer title as provided in G.S. 1A-1, Rule 70 and G.S. 1-228.

(3) The remedy of arrest and bail, as provided in Article 34 of Chapter 1 of the General Statutes, shall be available in actions for child-support payments as in other cases.

(4) The remedies of attachment and garnishment, as provided in Article 35 of Chapter 1 of the General Statutes, shall be available in an action for child-support payments as in other cases, and for such purposes the child or person bringing an action for child support shall be deemed a creditor of the defendant. Additionally, in accordance with the provisions of G.S. 110-136, a continuing wage garnishment proceeding for wages due or to become due may be instituted by motion in the original child support proceeding or by independent action through the filing of a petition.

(5) The remedy of injunction, as provided in Article 37 of Chapter 1 of the General Statutes and G.S. 1A-1, Rule 65, shall be available in actions for child support as in other cases.

(6) Receivers, as provided in Article 38 of Chapter 1 of the General Statutes, may be appointed in actions for child support as in other cases.

(7) A minor child or other person for whose benefit an order for the payment of child support has been entered shall be a creditor within the meaning of Article 3 of Chapter 39 of the General Statutes pertaining to fraudulent conveyances.

(8) A judgment for child support shall not be a lien against real property unless the judgment expressly so provides, sets out the amount of the lien in a sum certain, and adequately describes the real property affected; but past due periodic payments may by motion in the cause or by a separate action be reduced to judgment which shall be a lien as other judgments.

(9) An order for the payment of child support is enforceable by proceedings for civil contempt and its disobedience may be punished by proceedings for criminal contempt, as provided in Chapter 5A, Contempt, of the General Statutes.

(10) The remedies provided by Chapter 1 of the General Statutes, Article 28, Execution; Article 29B, Execution Sales; and Article 31, Supplemental Proceedings, shall be available for the enforcement of judgments for child support as in other cases, but amounts so payable shall not constitute a debt as to which property is exempt from execution as provided in Article 32 of Chapter 1 of the General Statutes.

(11) The specific enumeration of remedies in this section shall not constitute a bar to remedies otherwise available. (1967, c. 1153, s. 2; 1969, c. 895, s. 17; 1975, c. 814; 1977, c. 711, s. 26; 1979, c. 386, s. 10.)

SUPREME COURT OF NORTH CAROLINA

FILED
JUL -6 PM 1:57

SARAH W. STANLEY	)	
	)	No. 8026DC627
V.	)	From Mecklenburg
LACEY G. STANLEY, JR.	)	
	)	

****

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

NOTICE is hereby given that Lacey G. Stanley, Jr., the Appellant above named, hereby appeals to the Supreme Court of the United States from the final Judgment of the Supreme Court of North Carolina dismissing Appeal on Motion of Plaintiff and denying Petition for Discretionary Review, entered in this action on June 8, 1981.

This Appeal is taken pursuant to Title 28, United States Code, Section 1257, Sub-paragraph (2).

DATED: July 2, 1981.

Rodney S. Toth
Attorney for the Appellant

APPENDIX G

K.D.

ORIGINAL

NO. 81-5400

IN THE SUPREME COURT OF THE UNITED STATES

RECEIVED
OCT 10 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

LACEY G. STANLEY, JR.
APPELLANT

VS.

SARAH W. STANLEY,
APPELLEE

MOTION TO DISMISS

David B. Hamilton
Counsel for Appellee

OF COUNSEL:

FARRIS, MALLARD & UNDERWOOD, P.A.
1700 Southern National Center
Charlotte, North Carolina 28202
Telephone: 704/372-9110

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NO. 81-5400

IN THE SUPREME COURT OF THE UNITED STATES

LACEY G. STANLEY, JR.	)
	)
APPELLANT	)
	)
VS.	)
	)
SARAH W. STANLEY	)
	)
APPELLEE	)

MOTION TO DISMISS

Sarah W. Stanley, Appellee, through her attorneys, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves the Court to dismiss the Jurisdictional Statement of Lacey G. Stanley, Jr., Appellant, heretofore filed in this cause, and as grounds therefor, Appellee shows the Court as follows:

I. STATEMENT OF FACTS

Appellee instituted this action against Appellant on October 8, 1979. Appellee's complaint requested, among other things, that judgment be entered against Appellant in an amount sufficient to reimburse Appellee for Appellant's share of the costs incurred by her for the support and maintenance of the minor child born of the marriage of the parties (the "child") for a period of three (3) years preceding the institution of this action, and for an award of prospective child support.

The evidence presented to the trial court established that Appellant, after paying nominal sums to Appellee for the support of the child for a short period after the child's birth, paid nothing to Appellee for the support of such child after 1966 (Rpp 32, 43).[1] This failure of support existed despite the fact that Appellant was at most times employed and, in fact, at times earned as much as $1,500 per month (Rp 42). Further, the

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1. References are to the record on appeal in the North Carolina Court of Appeals.

evidence established that Appellant evidenced a course of conduct whereby he was constantly moving, and changing his residence and employment (Rp 42). As a result of Appellant's constant moves and his refusal to inform Appellee of his whereabouts, Appellee was never able to bring Appellant into court and attempt to require him to fulfill his obligations as the child's father.

The evidence further established that Appellee had expended in excess of $400 per month for the support of the child for the three-year period preceding the intiation of this action, and that Appellee had incurred extraordinary medical expenses on behalf of the child, a portion of which would not be covered by insurance (Rpp 33-34, 55-56, 64). Similarly, the evidence established that Appellee was expending a similar amount for the support of the child at the time of the trial of this matter (Rpp 34-35, 51-56).

Based upon the evidence presented, the trial court made extensive findings of fact to support both its judgment of reimbursement in favor of Appellee and its award of prospective child support. The findings of fact, among other things, considered those amounts actually expended by Appellee for the support of the child for the three-year period preceding the initiation of this action for which she was entitled to reimbursement from Appellant as his "fair share of support for that period of time" (Rp 64). These findings further stated that Appellant had not made sufficient efforts to find employment and pay to Appellee a reasonable sum for the support of the child, and that Appellant's failure to exercise sufficient effort to find employment and to exercise his earning capacity was in disregard of his obligation to provide reasonable support for the child (Rp 65). These findings further considered the amount of prospective child support which Appellant was to pay to Appellee for the support of the child.

Based upon these and other findings of fact, the trial court entered a judgment in favor of Appellee and against Appellant in the amount of $14,400 by way of reimbursement and further awarded Appellee the sum of $200 per month as prospective child support,

which matters were contained in the Order of the trial court filed January 9, 1980 (hereinafter the "Order") (Rpp 64-68).

From this Order Appellant appealed to the North Carolina Court of Appeals. After considering the record on appeal and the briefs and arguments of counsel, the North Carolina Court of Appeals, on March 17, 1981, entered an opinion affirming the decision of the trial court. From this decision Appellant filed a Notice of Appeal and Petition for Discretionary Review with the North Carolina Supreme Court. On June 8, 1981, the North Carolina Supreme Court dismissed Appellant's appeal and denied his Petition for Discretionary Review. Thereafter, Appellant filed Notice of Appeal with the United States Supreme Court.

II. ARGUMENT

A. THE QUESTIONS RAISED BY APPELLANT IN HIS JURISDICTIONAL STATEMENT WERE NOT TIMELY OR PROPERLY RAISED HERETOFORE AND HAVE NOT BEEN EXPRESSLY PASSED ON BY ANY TRIBUNAL.

A review of the record in this cause unmistakably demonstrates that the issues now being raised by Appellant were neither presented to nor considered by the trial court or the North Carolina Court of Appeals. While Appellant asserts that the constitutional issues which he now propounds were preserved, the record clearly shows that at no time was any mention made of these issues until Appellant raised them in support of his Notice of Appeal and Petition for Discretionary Review with the North Carolina Supreme Court.[2] It is submitted that this failure on the part of Appellant to raise these issues before both the trial court and the North Carolina Court of Appeals precludes his now asserting them before the United States Supreme Court.

This appeal is based upon 28 U.S.C. Section 1257(2). This statute allows judgments to be reviewed by this Court where there is drawn in question the validity of a statute of any state on

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2. This same argument was raised before the North Carolina Supreme Court in Appellee's Motion to Dismiss and Response to Petition for Discretionary Review filed in response to Appellant's Notice of Appeal and Petition for Discretionary Review. Apparently the North Carolina Supreme Court agreed with this position, as Appellant's appeal was dismissed and his Petition for Discretionary Review was denied. A copy of Appellee's Motion to Dismiss and Response to Petition for Discretionary Review is attached as Appendix A.

the ground of its being repugnant to the Constitution, and the decision of the state court is in favor of the validity of the statute. Yet no tribunal to date has been asked to consider the validity of N.C. Gen. Stat. Section 50-13.4, the statute whose constitutionality Appellant has questioned.

The record on appeal is devoid of any evidence that Appellant raised any constitutional issues before the trial court. Appellant lamely suggests that these issues were preserved as a result of his filing a Motion to Dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.[3] However, this assertion is both factually and legally incorrect. The record on appeal reflects the factual absence of any such argument by Appellant. Moreover, under North Carolina law, as reflected by the North Carolina Court of Appeals in its opinion in this cause, a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure would not cause a dismissal on such constitutional grounds.[4]

Moreover, there was no argument or discussion before the North Carolina Court of Appeals by Appellant of the issues he now raises before this Court. While Appellant listed several assignments of error relating to alleged constitutional issues, the brief which he filed with the North Carolina Court of Appeals contained no argument or discussion of the matters contained in his Jurisdictional Statement presented to this Court.[5] The only reference to constitutional issues contained in Appellant's Brief can be found in Section B of his argument, where Appellant asserted that "the trial court erred and violated (Appellant's) constitutional rights to due process of law and equal protection of the law by awarding back child support payments in the amount

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3. Appellant's Jurisdictional Statement at p. 6 (hereinafter "Jurisdictional Statement").

4. The citation for the reported decision of the North Carolina Court of Appeals in this cause is Stanley v. Stanley, 51 N.C. App. 172, ____ S.E.2d ____ (1981). See also, N.C. Gen. Stat. Section 1A-1, Rule 12(b)(6).

5. A copy of Appellant's Brief with the North Carolina Court of Appeals is attached as Exhibit B, and is hereafter referred to as "Appellant's Brief."

of $14,400 based upon insured medical expenses and no showing of (Appellant's) ability to pay." Appellant's Brief at pp. 4-5. In support of this contention, Appellant argued that the trial court considered the same evidence for both its award of reimbursement and its order requiring Appellant to pay prospective child support. Under these alleged circumstances, Appellant asserted, "Therefore, it is unconstitutional as a violation of due process of law and equal protection of the law to impose upon (Appellant) an obligation to reimburse (Appellee) for more child support than he would logically have been required to pay as present child support." Appellant's Brief at p. 5.

The foregoing are the sole statements in Appellant's Brief supporting his "constitutional" assignments of error submitted to the North Carolina Court of Appeals. There is nothing else in the record nor in Appellant's Brief, nor anywhere else, which raises the issues Appellant now asks the United States Supreme Court to consider.[6]

As noted, it was only when Appellant filed his Notice of Appeal and Petition for Discretionary Review with the North Carolina Supreme Court that arguments even remotely similar to those now being presented to this Court were raised. Moreover, as also noted, the North Carolina Supreme Court chose to dismiss Appellant's appeal and deny his Petition for Discretionary Review. It neither heard nor considered the constitutional issues then raised by Appellant, which issues are similar to those now before this Court.

Accordingly, Appellant should not now be allowed to raise novel arguments which no tribunal to date has been asked to consider. Clearly no tribunal has expressly, or even impliedly, considered the validity of the statute at issue. Thus, it is submitted that the Jurisdictional Statement should be dismissed.

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6. Having failed to raise these arguments in his Brief, Appellant arguably abandoned his right to have them considered before the North Carolina Court of Appeals. See, Rule 28, North Carolina Rules of Appellate Procedure.

B. THE ISSUES NOW RAISED BY APPELLANT IN HIS JURISDICTIONAL STATEMENT HAVE BEEN RENDERED MOOT BY CHANGES IN NORTH CAROLINA LAW.

In his Jurisdictional Statement, Appellant alleges that "the application of NCGS Sec. 50-13.4 (sic) requiring the father to be primarily liable for the support of the minor child violates equal protection of the law." Jurisdictional Statement at 8. Regardless of the constitutional considerations relevant to the interpretation and application of this statute as it is quoted by Appellant in his Jurisdictional Statement, Appellant's argument has now been rendered moot by the revision of this statute.

The North Carolina legislature recently amended N.C. Gen. Stat. Section 50-13.4(b) to make the father and the mother both primarily liable for child support.[7] This statute now reads as follows:

> In the absence of pleading and proof that the circumstances otherwise warrant, the father and the mother shall be primarily liable for the support of a minor child, and any other person, aggency, organization or institution standing in loco parentis shall be secondarily liable for such support. Such other circumstances may include, but shall not be limited to, the relative ability of all the above-mentioned parties to provide support or the inability of one or more of them to provide support, and the needs and estate of the child....[8]

Given the fact that the substance of Appellant's equal protection argument has been rendered moot, it is submitted that this issue need not and should not now be considered by this Court.[9] Thus, Appellant's Jurisdictional Statement as it relates to this issue should be dismissed.

C. THE ORDER OF THE TRIAL COURT RESTS ON WELL RECOGNIZED PRINCIPLES OF NORTH CAROLINA LAW WHICH ARE NOT VIOLATIVE OF ANY CONSTITUTIONAL IMPERATIVE.

As heretofore noted, at no time did Appellant raise before the trial court or the North Carolina Court of Appeals the issue of the validity of N.C. Gen. Stat. Section 50-13.4. Accordingly, the Order entered by the trial court and the decision of the

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7. 1981 N.C. Adv. Legis. Serv. Chapter 613, at p. 21.

8. Id.

9. See, Morris v. Weinberger, 410 U.S. 422, 93 S.E. 1408 (1973).

North Carolina Court of Appeals were based upon other precepts of law considered by these courts. It is therefore submitted that the Order of the trial court which is the basis of this appeal rests on an adequate non-federal basis.

A review of the record in this case demonstrates that the trial court did not impose an inequitable or unconstitutionally improper burden on Appellant. The award of reimbursement by the trial court was based upon several principles of law as previously set forth by the North Carolina courts.[10] As the record reflects, the trial court ordered Appellant to pay only his "fair share of support" for the support of his child (Rp 64). This share of support was substantially less than the record evidence of the total monthly needs of the child (Rpp 33-34, 55-56, 64).

In addition, the award of prospective support was only $200 per month, despite evidence that the needs of the child were more than double that amount (Rpp 34-35, 51-56). This award was based not on Appellant's present earnings, but instead on his earning capacity (Rpp 63-65). Such an award was in accordance with numerous decisions of the North Carolina courts allowing an award of child support based on earning capacity rather than actual earnings where the evidence supports a finding that the party required to pay support has failed to exercise his or her capacity to earn because of a disregard of his or her marital obligation to provide reasonable support.[11]

Thus, in entering its Order, the trial court adhered to well recognized principles of North Carolina law, as codified by N.C. Gen. Stat. Section 50-13.4, which require that all of the circumstances demonstrated by the evidence should be considered in imposing an award of child support, both prospective and by way of reimbursement.[12] The North Carolina Supreme Court, in recognizing that all circumstances are decisive in considering matters

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10. See, Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976); Hicks v. Hicks, 34 N.C. App. 128, 237 S.E.2d 307 (1977).

11. E.g., Beall v. Beall, 290 N.C. 669, 228 S.E.2d 407 (1976); Holt v. Holt, 29 N.C. App. 124, 223 S.E.2d 542 (1976).

12. See, Hicks v. Hicks, supra note 10.

of child support, has also stated in Coble v. Coble, 300 N.C. 708, 711, 268 S.E.2d 185 (1980), "Taken together, these two statutes (N.C. Gen. Stat. Sections 50-13.4(b) and (c)) clearly contemplate a mutuality of obligation on the part of both parents to provide material support for their minor children where circumstances preclude placing the duty of support upon the father alone."

The trial court, in recognizing this "mutuality of obligation," in fact imposed a lesser burden on Appellant than on Appellee for prospective support, and ordered him to pay reimbursement for only three years, despite his complete failure to fulfill his obligation as a parent since 1966 (Rpp 32, 43).[13] Under these circumstances, it is clear that the decision of the trial court rested on an adequate non-federal basis. That is, the trial court ordered both reimbursement and prospective child support after considering all of the circumstances present, and not based upon the sole concept of Appellant's "primary" responsibility to provide such support. Similarly, the decision of the North Carolina Court of Appeals, in affirming the Order entered by the trial court, based its decision upon a review of the principles of North Carolina law enumerated herein, and not upon any concepts considered in Appellant's Jurisdictional Statement. For these reasons, the Jurisdictional Statement should be dismissed.

D. THE CONSTITUTIONAL ISSUES RAISED IN THE JURISDICTIONAL STATEMENT ARE NOT SUBSTANTIAL.

Finally, it is submitted that the issues raised in the Jurisdictional Statement are not substantial, and that for this reason the Jurisdictional Statement should be dismissed. A review of the record and of the law support this position.

There is nothing in N.C. Gen. Stat. Section 50-13.4 which suggests that the classifications, if any, imposed by the language of the statute in force at the time of the entry of the

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13. The trial court acted properly in ordering reimbursement for only three years, as this was the maximum period as a matter of law for which reimbursement could be ordered. See Tidwell v. Booker, supra, note 10.

trial court's Order present any invidious discrimination subject to attack as violative of the concept of equal protection. Instead, as previously noted, the application of this statute by the North Carolina courts has imposed upon parents a "mutuality of obligation" which, depending upon the circumstances, could require either parent to provide child support.[14]

Moreover, the concept of due process of law lends no support to the arguments contained in the Jurisdictional Statement. The record in this cause clearly establishes that the procedural due process guarantees of the right to notice and a hearing were afforded Appellant. Further, any suggestion that substantive due process guarantees were violated is unfounded for, as noted in the case of State v. Joyner, 286 N.C. 366, 371, 211 S.E.2d 320 (1974), "Substantive due process is a guarantee against arbitrary legislation, demanding that the law shall not be unreasonable, arbitrary or capricious, and that the law be substantially related to the valid object sought to be obtained (citations omitted)." There is nothing in the record to suggest that these precepts were violated by the actions of either the trial court or the North Carolina Court of Appeals.

Thus, Appellant's constitutional contentions are without substance. There is nothing in the record to indicate that Appellant's guarantee of equal protection or due process, either substantive or procedural, have been violated in any way in this cause. Therefore, the Jurisdictional Statement should be dismissed.

III. CONCLUSION

In conclusion, it is submitted that the Jurisdictional Statement should be dismissed on several grounds. First, the issues tendered in the Jurisdictional Statement were not presented to the trial court or the North Carolina Court of Appeals. Accordingly, there has been no decision to date, as required by 28 U.S.C. Section 1257(2), expressly in favor of the validity of N.C. Gen. Stat. Section 50-13.4. Second, this matter has now

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14. See Coble v. Coble, supra.

been rendered moot by the amendment of this statute. Third, the record in this cause reflects the fact that the Order of the trial court and the decision of the North Carolina Court of Appeals rest on valid non-federal principles of law. Finally, there is no substance to the equal protection and due process arguments being made by Appellant. Thus, Appellee prays that this Court dismiss the Jurisdictional Statement of Appellant, refuse to take jurisdiction of this appeal, and affirm the decision of the North Carolina Court of Appeals.

Respectfully submitted this 11th day of October, 1981.

David B. Hamilton
Attorney for Appellee

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NO. ~~8026DC622~~ TWENTY-SIXTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Spring Term 1981

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the record clearly shows that at no time was any mention made of these issues while the matter was before the trial court. Moreover, while appellant noted constitutional issues as a basis for his appeal to the Court of Appeals, a review of appellant's Brief tendered to the Court of Appeals shows that the issues now being raised were not presented to the Court of Appeals for its consideration and determination.

(3) Pursuant to Rule 16 of the North Carolina Rules of Appellate Procedure, review by the Supreme Court after a determination by the Court of Appeals is to determine whether there is error of law in the decision of the Court of Appeals. Given the fact that appellant's Brief tendered to the Court of Appeals did not raise or discuss the issues now being presented in his Notice of Appeal, it is submitted that the matter should not now be subject to review by the Supreme Court.

PETITION FOR DISCRETIONARY REVIEW

Appellee, responding to appellant's Petition for Discretionary Review, asserts that the North Carolina Supreme Court should decline to certify for review the decision of the Court of Appeals for the following reasons:

(1) As heretofore stated, pursuant to Rule 16 of the North Carolina Rules of Appellate Procedure, it is submitted that the constitutional issues now being raised by appellant should not be subject to review by the Supreme Court.

(2) There is no factual or legal basis to support appellant's claim that this matter falls within the provisions of N. C. Gen. Stat. §7A-31.

Respectfully submitted this 27th day of April, 1981.

David B. Hamilton /s/
David B. Hamilton,
Attorney for Plaintiff-Appellee

OF COUNSEL:

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Best Copy Available

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Plaintiff-Appellee's Motion to Dismiss and Response to Petition for Discretionary Review was duly served upon attorney for defendant-appellant, Mr. Rodney S. Toth, at McConnell, Howard, Pruett & Toth, 1404 City National Center, 200 South Tryon Street, Charlotte, North Carolina, 28202, in an envelope, postage prepaid, deposited in a depository under the custody of the United States Post Office Department at Charlotte, North Carolina, this 27th day of April, 1981.

David B. Hamilton /s/

David B. Hamilton

Best Copy Available

NO. 8026DC627 TWENTY-SIXTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

SARAH W. STANLEY	)	
	)	
v.	)	From Mecklenburg
	)	
LACEY G. STANLEY, JR.	)	

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DEFENDANT APPELLANT'S BRIEF
(Filed Jul 17 10:52 AM '80)

****

NO. 8026DC627 TWENTY-SIXTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

SARAH W. STANLEY)
)
v.) From Mecklenburg
)
LACEY G. STANLEY, JR.)

****

DEFENDANT APPELLANT'S BRIEF
(Filed Jul 17 10:52 AM '80)

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I. ARGUMENT

A. THE TRIAL COURT ERRED IN AWARDING CHILD SUPPORT PAYMENTS TO THE PLAINTIFF IN THE AMOUNT OF $200.00 PER MONTH WHEN THERE WAS NO COMPETENT EVIDENCE UPON WHICH TO BASE FINDINGS OF FACT THAT DEFENDANT HAD THE ABILITY TO PAY.

Assignments of Error Nos. 2, 3, 6.
Exceptions Nos. 6 through 15 (R p 78); 29 through 35 (R p 79); 30 through 35 (R p 80); 36 (R p 81).

1. Ability to Pay

The trial court erred in not considering the defendant's ability to pay child support to the plaintiff. The Court of Appeals in the case of HOLT v. HOLT, 29 NC App. 124, 223 SE 2d 542 (1976) held:

> While it is the legal obligation of the father to provide for the support of his minor children, G.S. 50-13.4 and while the welfare of the child is a primary consideration in the matters of custody and maintenance, "yet common sense and common justice dictate that the ultimate object in such matters is to secure support commensurate with the needs of the child and the ability of the father to meet the needs." CROSBY v. CROSBY, 272 NC 235, 237,

157 SE 2d 77, 79 (1967); GIBSON v. GIBSON, 24 NC App. 520, 211 SE 2d 522 (1975). In determining the ability of the father to support the child the Court ordinarily should examine the father's present earnings, POWELL v. POWELL, 25 NC App. 695, 214 SE 2d 808 (1975), rather than "select the earnings for a single year in the past and use that as the basis for an award." 29 NC App. at 127, 223 SE2d at 544.

Here, the evidence clearly shows that the defendant at the present time is unemployed (R pp 15, 79) and has no present income despite diligent attempts to obtain employment in his chosen field. A parent who is unable to support his child is not liable. 59 Am. Jur. 2d, PARENT AND CHILD, §54 (1971). In the case at bar a payment of $200.00 per month when the defendant is presently unemployed would require an expenditure in excess of his ability to pay. In holding the trial court in error for requiring a defendant to make payments which exceeded his own necessary expenses, the Supreme Court of North Carolina stated, "The question of the correct amount of alimony and child support is a question of fairness to all parties. We hold that, under present conditions, the payments required of Defendant impose too great a burden and are unfair to him." BEALL v. BEALL, 290 NC 669, 675, 228 SE 2d 407, 413 (1976). In the case at bar defendant's reasonable expenditures amount to $988.40 per month (R p 16). At the present time the defendant appellant is unable to meet his own financial needs, much less the needs of the minor child. In the absence of a finding of fact based upon competent evidence that the defendant has the present ability to pay child support, the Judgment of the trial court ordering him to do so must be reversed.

Neither does the finding of fact that the defendant's failure to exercise sufficient effort to find employment and to exercise his earning capacity is and has been in disregard of his obligation to provide reasonable support for the child justify the conclusion of law that the defendant pay child support in the amount of $200.00 per month. In order to support the findings of fact it must be based on competent evidence. HOLT v. HOLT, supra. The case at bar is devoid of any evidence the defendant intentionally disregarded his duty to find employment. In fact, the defendant has

worked diligently after his last employment in July of 1978 to obtain employment in his field by contacting over 30 major airlines (R p 75), and obtain his Boeing 727 flight certificate. Unfortunately, the economic recession and the defendant's age have precluded him from obtaining employment (R pp 62-63). In short, the trial court did not comply with N.C.G.S. 50-13.4 providing the Court have "due regard to the estates, earnings, accustomed standard of living of the child and the parties, and other facts of the particular case." MONTGOMERY v. MONTGOMERY, 32 NC App. 154, 231 SE 2d 26 (1977).

2. Education

The lower court erred in awarding a decree of child support against the defendant in which part of the minor child's support would go to education in a private school without considering and making findings of facts as to the needs of the child, the supporting spouse's ability to pay, the consent of the father and an Order granting court approval. Ordinarily, education comes within the practical mean of the term "necessaries" which a parent must furnish to his minor children. Lee, NC FAMILY LAW, §237 (1963). The issue here is whether or not the wife may place the minor child in a private school system which was not consented to by the defendant, and for which he has no ability to pay. In North Carolina it is held:

> We are of the opinion that the father, unless his parental authority has been taken away by the court, is the one to decide the extent of and the place of education of his child beyond that which is provided by the public school system. However, where the custody has been taken away from the father by the court, we are of the opinion that the custodian, subject to the approval of the court in cases where the father is required by the court to pay therefor is the one to make such decision. ZANDE v. ZANDE, 3 NC App. 149, 164 SE 2d 523 (1968).

In the case at bar there is no finding of fact approving the education of the minor child in a private school system. Factors considered by the courts in addition to the needs of the child are the ability of

the supporting spouse to pay and the consent by the supporting parent. Thus, in DEGENER v. DEGENER, 478 SW 2d 687 (19__) the court held a father was not liable for the private education of his children where he did not have such private earning capacity to pay, and in MITCHELL v. MITCHELL, 81 Ohio L. Abs. 88, 158 NE 2d 546 (19___), the father could not be compelled to pay for college education of children in the absence of an agreement. In the instant case there is no evidence of an agreement by the defendant to place his child in a private school and certainly none of his ability to pay. The trial court's failure to find facts that the defendant support the private education of his child is in error within the meaning of GS 50-13.4 when requiring the defendant to make monthly child support payments which will contribute to the private education of his child.

B. THE TRIAL COURT ERRED AND VIOLATED THE DEFENDANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW BY AWARDING BACK CHILD SUPPORT PAYMENTS IN THE AMOUNT OF $14,400.00 BASED UPON INSURED MEDICAL EXPENSES AND NO SHOWING OF THE DEFENDANT'S ABILITY TO PAY.

Assignments of Error Nos. 2, 3, 4, 5 and 6.
Exceptions Nos. 5 (R p 77); 6 through 15 (R p 78); 16 through 23 (R p 79); 30 through 35 (R p 80); 36 (R p 81).

The Court made no findings of fact, nor was there competent evidence to indicate the defendant had a present ability to pay child support over the previous three years prior to institution of this action. In an award of child support, the defendant's ability to pay and to reimburse must be considered by the trial court. HOLT v. HOLT, supra; BEALL v. BEALL, supra; HICKS v. HICKS, 34 NC App. 128, 237 SE 2d 307 (1977). Here, as in the case of the $200.00 future child support, there is no competent evidence to show defendant's ability to pay. To the contrary, in 1979 the defendant was unemployed, and in 1978 earned less than $8,000.00 (R p 19).

In addition, this Judgment in the amount of $14,400 ($400.00 x 36 months) cannot be upheld when the trial court also held the defendant liable to pay $200.00 per month in future child support.. These find-

ings of fact and conclusions of law are mutually exclusive. The court considered the same evidence for both awards. Therefore, it is unconstitutional as a violation of due process of law and equal protection of the law to impose upon the defendant an obligation to reimburse the plaintiff for more child support than he would logically have been required to pay as present child support. The only difference in expenditures would possibly have been the medical expenses presented by the plaintiff. However, the plaintiff herself testified that Blue Cross insurance would cover part or some of her medical expenses (R pp 54-55). This is reflected in the court's findings of fact which stated, "Plaintiff has incurred extraordinary medical expenses for the child which expenses in 1979 totalled $4,474.93. A major portion of these medical expenses have been or should be covered by insurance; however, plaintiff has incurred and will incur a great amount of uninsured medical and hospitalization expenses as a result of the illness of the child" (R p 78). The defendant strongly urges that there was incompetent evidence and an improper finding of fact to enable the plaintiff to recover $400.00 per month in back child support due to extraordinary medical expenses, part of which may or have been covered by insurance. Furthermore, the medical expenses were incurred in the year 1979. If the plaintiff is to be reimbursed for child support expenditures, it must be for support actually rendered based upon competent evidence. No evidence is present in the record of actual medical expenses for the years 1977 and 1978. Therefore, the Judgment of the Honorable William G. Jones must be vacated insofar as it awards back child support payments to the plaintiff in the amount of $400.00 per month.

In addition, the court erred by awarding any reimbursement to plaintiff for child support during the previous three years. As provided in N.C.G.S. 50-13.4 and numerous cases cited above, the plaintiff may only recover necessary expenses. However, in the case at bar, the child support for the plaintiff was set at $10.00 per week by a Court Order entered in 1964. Thus, defendant's Motion to Dismiss pursuant to Rule 12(b)(6) should have been allowed in that the plaintiff's proper procedure was to proceed under G.S. §50-13.7, Modification of Order for Child Support or Custody. In any event, there must be a showing of changed circumstances

in order to increase the support of the minor children. WALLER v. WALLER, 20 NC App. 710, 202 SE 2d 791 (1974); CROSBY v. CROSBY, 272 NC 235, 158 SE 2d 77 (1967). In the case at bar there was no showing of changed circumstances or any findings of fact to that effect. Therefore, the original support decree requiring the defendant to pay $40.00 per month in child support governs.

II. STATEMENT OF THE CASE

A. PROCEEDINGS

The plaintiff appellee, Sarah W. Stanley, brought this action against the defendant appellant, Lacey G. Stanley, Jr., for child support and maintenance for their child, Joy Stanley, before the January, 1979, term of the District Court of Mecklenburg County. After a hearing on the matter, the Honorable William G. Jones, Judge Presiding, entered a Judgment in favor of the plaintiff requiring the defendant to pay to the plaintiff the amount of $14,400.00 in back child support, and to begin paying child support in the amount of $200.00 per month, and to grant the plaintiff a security interest in the 1977 Oldsmobile of the defendant. From this Order the defendant appealed.

B. FACTS

The plaintiff and defendant were married on November 30th, 1963 (R p 5), never got along, lived for a while at the home of the plaintiff's parents and separated shortly afterwards. They were the parents of one child to the marriage, Joy Elizabeth Stanley, born September 23rd, 1964 (R p 5). After the separation, the parties appeared at a Court hearing in which the plaintiff did not appear, and the Judge ordered the defendant, Mr. Stanley, to continue to pay $10.00 per week child support (R p 60). Thereafter the defendant left Charlotte and worked at numerous small odd jobs earning from $1.45 to $2.92 per hour (R p 32). After becoming a licensed airplane pilot, the defendant worked for several small freight airlines earning approximately $700.00 per month from 1971 until 1974 and $850.00 per month from 1977 until April 1978 (R p 32). At that time the defendant did obtain a job from April 1978 until July 1978 at a salary of $1500.00 per month, but his job was terminated when the company for which

he worked ran into financial difficulty and the airplane was sold (R p 32). In total, the defendant earned less than $8,000.00 in 1978 (R p 19). Since that time he has attempted to find other employment, but has been prevented because of his age, 36, which is past the cut-off point for most airlines hiring new pilots (R p 63). Since then, the defendant has unsuccessfully attempted to find employment (R pp 63, 72-77; Exhibits B. C. D. E) and is currently receiving no income (R p 15).

The plaintiff alleged she expended over $400.00 per month for the support of the minor child (R p 67), and that she had incurred extensive medical expenses for the year 1979, most of which have been covered by Blue Cross/Blue Shield medical insurance (R p 47). Part of the expense of support was tuition for a private school (R pp 46-49) and payments on a late model Cadillac (R p 53).

The Honorable William G. Jones, Judge presiding, found as a fact that "Plaintiff has incurred extraordinary medical expenses for the child which expenses in 1979 totalled $4,474.93. A major portion of these medical expenses have been or should be covered by insurance; however, plaintiff has incurred and will incur a great amount of uninsured medical and hospitalization expenses as a result of the illness of the child." (R p 78) The Court also found that the plaintiff had expended for the support for the needs of the child for the three year period preceding the initiation of this action an amount in excess of $400.00 per month, and that defendant's fair share of support for that period of time was $400.00 per month (R p 79). The Court went on to find that the child has individual financial needs well in excess of the sum of $200.00 per month, and ordered the defendant to begin paying $200.00 per month to the plaintiff as reasonable child support (R pp 80-81) and granted the plaintiff a security interest in the defendant's 1977 Oldsmobile. This appeal followed:

III. ISSUES

1. Whether or not the trial Court erred in holding the defendant liable to pay child support in the amount of Two Hundred Dollars ($200.00) per month when there was no competent evidence defendant had the

ability to pay? Yes.

2. Whether or not the trial Court erred and violated the defendant's constitutional rights to due process of law and equal protection of the law by awarding back child support payments in the amount of Fourteen Thousand Four Hundred Dollars ($14,400.00) based upon insured medical expenses and without determining the defendant's ability to pay? Yes.

IV. CONCLUSION

In short, the defendant Stanley cannot be required to make future child support payments when there has been no findings of fact of his ability to pay such payments. N.C.G.S. §50-13.4 provides the ability of the father must be taken into consideration. While there was a finding of fact in that defendant disregarded his duty to provide support, no competent evidence was present in the record. The only evidence present was that defendant had contacted numerous airlines in an attempt to gain employment and had actually gone to school to obtain his Boeing 727 certification. Further, the decree of child support requires the defendant to contribute to the support of his minor child who is enrolled in a private school. There is no duty on behalf of the defendant to pay such private schooling in the absence of his ability to pay and his consent. Neither is present from the evidence, and no finding of fact was made to either.

While the Court concluded the defendant's future child support was to be in the amount of Two Hundred Dollars ($200.00) per month, it awarded back child support to the plaintiff in the amount of Four Hundred Dollars ($400.00) per month. As in the case of future child support payments, there was no showing or finding of fact of the defendant's present ability to support at that time. More importantly, the Court considered medical expenses in excess of Four Thousand Dollars ($4,000.00) in determining the amount of back support payments. However, some or all of these medical expenses were to be covered by insurance. In short, no precise evidence was available to the Court upon which to base its findings of fact, and the Order must therefore be reversed. Furthermore, the Court erred in awarding back child support payments in that an Order

providing for support was already in existence at the time this action was commenced, and takes precedence until a finding of fact showing changed circumstances is made, which finding has not been made thus far.

WHEREFORE, the Defendant, Lacy G. Stanley, Jr., prays the North Carolina Court of Appeals reverse the Judgment of the trial Court entered January 29, 1980.

RESPECTFULLY SUBMITTED

McCONNELL, HOWARD, PRUETT & TOTH

s/ Rodney Shelton Toth
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served a copy of the foregoing Brief for Appellant upon the Attorney for the Appellee, by depositing a copy of the same in the United States Mail, postage prepaid addressed to Mr. David B. Hamilton, Attorney at Law, Farris, Mallard & Underwood, 1700 Southern National Center, Charlotte, North Carolina 28202.

This the 16th day of July, 1980.

s/ Rodney Shelton Toth
Attorney for Appellant